

No. 10848

United States
Circuit Court of Appeals

For the Ninth Circuit.

JAMES TOZZI, doing business as James Tozzi
& Co.,

Appellant,

vs.

EMIL BALLEY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

OCT 6 - 1944

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | Page |
|---|-------|
| Amendment to Answer to Complaint..... | 29 |
| Answer to Complaint | 24 |
| Appeal: | |
| Certificate of Clerk to Transcript of Record on | 65 |
| Notice of (CCA) | 59 |
| Notice of (USDC) | 45 |
| Petition on (USDC) | 40 |
| Statement of Points on (DC)..... | 63 |
| Statement of Points and Designation of Record on (CCA) | 101 |
| Stipulation as to Record on (CCA)..... | 66 |
| Supersedeas Bond on | 60 |
| Certificate of Clerk to Transcript of Record on Appeal | 65 |
| Complaint | 2 |
| Exhibit 1—Check, dated Apr. 1, 1940 to order of James Tozzi & Co., signed Emil Balley | 8 |
| Exhibit 2—Invoices for Sale of Potatoes | 9, 23 |

| Index | Page |
|---|------|
| Designation of Record, Statement of Points and (CCA) | 101 |
| Findings of Fact and Conclusions of Law..... | 49 |
| Judgment | 55 |
| Motion for New Trial | 57 |
| Names and Addresses of Attorneys of Record.. | 1 |
| Notice of Appeal to CCA | 59 |
| Notice of Appeal to USDC | 45 |
| Notice of Entry of Judgment..... | 56 |
| Notice of Order for Judgment | 49 |
| Opinion | 47 |
| Order Denying Motion for New Trial..... | 59 |
| Petition on Appeal to USDC..... | 40 |
| Proceedings, Findings of Fact, Conclusions and Order of Dept. of Agriculture | 31 |
| Statement of Evidence (Stipulated Condensed) | 68 |
| Exhibits for Defendants: | |
| 1—Check dated Apr. 1 1940 payable to James Tozzi and Co. from Emil Balley | 68 |
| 2—Invoices for Sale of Potatoes | 69 |
| Set out at pages 9-23 | |
| 4—Telegram dated Apr. 6, 1940 from Balley to Tozzi | 72 |

Index

Page

Exhibits for Defendants:—(Continued)

7—Letter, April 4, 1940, Emil Balley
to L. A. Potato Distributors, Ex-
cerpt 83

10—Letter, Mar. 25, 1940, to Mr. Emil
Balley from the L. A. Potato Dis-
tributors, Inc. 94

Exhibit for Plaintiff:

A—Letter, Apr. 17, 1940, Mr. Balley
to Mr. Tozzi, Excerpt 79

Witness for Defendant:

Streeter, William M.
—direct 99

Tozzi, James
—direct 97

Witnesses for Plaintiff:

Balley, Richard Emil
—direct 68, 70
—cross 78, 93

Humble, Clarence A. (Deposition)
—direct 96

Tillotson, Mitchell (Deposition)
—direct 96

Statement of Points (DC) 63

Statement of Points and Designation of Rec-
ord on Appeal (CCA) 101

| Index | Page |
|---|-------------|
| Stipulation as to Record on Appeal (CCA) | 66 |
| Stipulation regarding Evidence and Testimony in USDC | 45 |
| Supersedeas Bond | 60 |

NAMES AND ADDRESSES OF ATTORNEYS

SMALLPAGE and MACOMBER,

Savings and Loan Bldg.,
Stockton, Calif.

Attorneys for Appellant.

WILSON S. WILEY, ESQ.,

Medical Dental Bldg.,
Klamath Falls, Ore.

Attorney for Appellee.

United States of America
Before the Secretary of Agriculture
Agricultural Marketing Service
P. A. C. A. Docket No. 4010

EMIL BALLEY,

Complainant,

vs.

JAMES TOZZI, doing business as JAMES
TOZZI & CO.

Respondent.

COMPLAINT

Complainant above-named respectfully alleges:

I.

That the complainant is an individual, whose post office address is Merrill, Oregon.

II.

That the complainant is informed and believes that the respondent James Tozzi is an individual doing business as James Tozzi & Co., whose post office address is Stockton, California.

III.

That the respondent is licensed under the Perishable Agricultural Commodities Act of 1930 as a dealer, commission merchant, and/or broker.

IV.

That on or about the 26th day of March, 1940, in the course of interstate commerce, complainant

by oral contract contemplating the shipment of the commodity in interstate commerce, purchased from the respondent, by and through respondent's agent and servant William M. Streeter, 10,851 sacks, each of one hundred weight, of U. S. No. 1 size minimum varying potatoes, stored in a cold storage warehouse in Klamath Falls, Oregon, for the agreed price of \$1.45 per hundred weight or sack. [1*]

V.

That is was mutually agreed between the complainant and the respondent that the respondent should deliver to the complainant the said 10,851 sacks of potatoes f. o. b. Klamath Falls, Oregon, for the sum of \$15,733.95 payable as follows: \$2500.00 on or about April 1, 1940, and the balance sum of \$13,233.95 on or about April 6, 1940.

VI.

That pursuant to said oral agreement, the complainant, on or about the 29th day of March, 1940, paid to William M. Streeter, as agent for respondent, the sum of \$2500.00, represented by a check in said amount, drawn by the complainant on the Klamath Falls Branch of the First National Bank of Portland, Oregon, and made payable to respondent, which said check was thereafter endorsed "James Tozzi & Company," and collection of said amount made by respondent and accepted by respondent as part of the purchase price of said potatoes, a copy of said check being marked "Com-

*Page numbering appearing at foot of page of original certified Transcript of Record.

plainant's Exhibit 1;" that copies of the invoices for the sale of said potatoes are marked "Complainant's Exhibit 2."

VII.

That according to the terms of said oral agreement the balance of said purchase price was to be paid by complainant to respondent at a meeting between respondent's said agent and complainant on the 3rd day of April, 1940; that, in compliance with said understanding, complainant did call at the office of the respondent on said date when it was then agreed between complainant and respondent's said agent that they meet again on or about April 5, 1940, at the bank which held the warehouse receipts for said potatoes in order that said warehouse receipts could be delivered to the complainant upon the payment of the balance due on said purchase price. [2]

VIII.

That complainant and respondent's said agent did meet on April 6, 1940, in accordance with the previous understanding, and at said time and place complainant did offer respondent's said agent payment in full for the said potatoes, demanding at the time clear title to the said potatoes.

IX.

That respondent's said agent did then and there refuse to deliver clear title to said potatoes, demanding of the complainant that he assume the payment of the warehouse lien for storage on said potatoes, and did refuse the said offer of payment of the said balance due.

X.

That complainant did notify respondent of the failure of his said agent to perform the said agreement, and did demand that respondent perform said contract; that said respondent did fail, refuse and neglect to perform said agreement; that respondent has continued to retain the said down payment of \$2500.00 and has, on and prior to this date, sold the potatoes to third parties.

XI.

That at all times mentioned in this complaint, complainant was licensed as a dealer, commission merchant and broker in perishable agricultural commodities; that complainant did purchase said potatoes for the purpose of making a re-sale of same; that the price of potatoes of similar quality to those purchased by complainant from respondent f. o. b. Klamath Falls, Oregon, on or about April 6, 1940, varied from \$1.75 to \$2.00 per hundredweight, and that by reason of the breach of said contract by respondent complainant lost the difference between the said contract price of \$1.45 per hundredweight and the actual market value thereof, or 30c net per hundredweight, and [3] complainant was thereby damaged in the sum of \$3000.00.

XII.

That there is now due and owing complainant from respondent the following sums of money: \$2,500.00 down payment, bearing interest at the rate of 6% interest per annum from the 6th day of April, 1940, and \$3,000.00 as damages for the breach of said agreement.

XIII.

That the matters and actions set forth herein constitute a violation by respondent of Section 2 of the Perishable Agricultural Commodities Act of 1930.

XIV.

Complainant's exhibits, numbered 1 and 2, inclusive, are attached hereto as a part of this complaint.

Wherefore complainant prays that a copy of this complaint be served upon the above-named respondent and that he be required to answer the charges herein stated in writing within such time as the Secretary may require; that, upon the record made either with or without formal hearing, as provided in the Act or in the regulations, and by appropriate order, the complainant be awarded such amount of damages as he may be entitled to receive according to the facts established; and that the Secretary also make such other and further orders and take such disciplinary action contemplated by Section 8 of the Act as may be deemed fit and proper in the premises.

Dated at Klamath Falls, Oregon, this 26th day of April, 1941.

EMIL BALLEY

Complainant

WILSON S. WILEY and

G. Q. D'ALBINI,

Attorneys for Complainant.

608-9 Medical Dental Bldg.,
Klamath Falls, Oregon. [4]

State of Oregon,
County of Klamath—ss.

Emil Balley, being first duly sworn, says that he has read the foregoing complaint and knows the contents thereof, and that the same are true except as to matters therein stated on information and belief and as to such matters he believes them to be true, and that he is able to verify this complaint, being the complainant himself.

/s/ EMIL BALLEY

Subscribed and sworn to before me this 2nd day
of Mar. 1941.

(Seal) HARRY D. BROWN

Notary Public for Oregon.

My commission expires 9-24-41.

[Endorsed]: Rec'd May 5, 1941

Agricultural Marketing Service

U. S. Dept. of Agriculture [5]

COMPLAINANT'S EXHIBIT No. 1

Advance on 30 carload of potatoes @ \$1.45 per cwt.
potatoes U. S. No. 1, Size A.

Klamath Falls, Ore. April 1, 1940

Klamath Falls Branch 96-64

The First National Bank of Portland

Pay to James Tozzi & Co., or order \$2500.00 Twenty
Five Hundred & No./100.....Dollars

EMIL BALLEY

(Endorsements)

(1040) Pay to the order of (1040)

The First National Bank of Portland (Ore)

James Tozzi & Company

Pay to the order of

Any Bank, Banker or Trust Co

All prior endorsements guaranteed

Mar 30 1940

The First National Bank of Portland

96-198 Merrill Branch 96-198

40 Merrill Oregon 40

Pay Through Clearing House or pay to the order
of any bank, banker or trust company

April 1, 1940 0000

The First National Bank of Portland

Klamath Falls Branch 96-64

(Perforated note: "Paid 4;1,40 96-64" [6])

COMPLAINANT'S EXHIBIT No. 2

(30 separate invoices in this exhibit)

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 14-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 15-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 16-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|--|---|
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon |
|--|---|

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 17-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|--|---|
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon |
|--|---|

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|-------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 18-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |

Hay Potatoes Grain

P.O. Box 626—Malin, Oregon

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

| | | |
|---|-------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 19-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |

Hay Potatoes Grain

P.O. Box 626—Malin, Oregon

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|----------------------|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 20-I |
| All quotations sub- | Klamath Branch | Car |
| ject to confirmation | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|---------------------------|-------|--------|
| 360 | 100 lb US ONE Malin brand | | |
| | russets fob | 1.45 | 522.00 |

| | | |
|----------------------|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 21-I |
| All quotations sub- | Klamath Branch | Car |
| ject to confirmation | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |

| Quantity | Description | Price | Total |
|----------|---------------------------|-------|--------|
| 360 | 100 lb US ONE Malin brand | | |
| | russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 22-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|--|-------|--------|
| 360 | 100 lb US ONE Malin brand russets fob | 1.45 | 522.00 |

[8]

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 23-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|--|-------|--------|
| 360 | 100 lb US ONE Malin brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 24-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|--|-------|--------|
| 360 | 100 lb US ONE Malin brand russets fob | 1.45 | 522.00 |

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 25-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 26-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 27-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|----------------------|------------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 28-I |
| All quotations sub- | Klamath Branch | Car |
| ject to confirmation | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley | Shipped to | |
| Merrill, Oregon | Klamath Ice and Cold Storage | |
| | Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

| | | |
|----------------------|------------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 29-I |
| All quotations sub- | Klamath Branch | Car |
| ject to confirmation | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley | Shipped to | |
| Merrill, Oregon | Klamath Ice and Cold Storage | |
| | Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 30-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 31-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|--|-------|--------|
| 360 | 100 lb US ONE Malin brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 32-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

[10]

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 33-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 34-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 35-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 36-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice & Cold Storage Warehouse— Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 37-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 38-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal & Malin brand russets fob | 1.45 | 522.00 |

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & Co. | File 39-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 40-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

| | | |
|---|---|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 41-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |
| Sold to Emil Balley Merrill, Oregon | Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon | |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldscal brand russets fob | 1.45 | 522.00 |

Complainant's Exhibit No. 2—(Continued)

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 42-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | Klamath Ice and Cold Storage |
| | Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 360 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 522.00 |

[12]

| | | |
|---|----------------------------|-------------|
| Bus. Phone 2501 | Invoice | Date 4/1/40 |
| Res. Phone 1332 | JAMES TOZZI & CO. | File 43-I |
| All quotations sub- ject to confirmation | Klamath Branch | Car |
| | | From..... |
| | Hay Potatoes Grain | |
| | P.O. Box 626—Malin, Oregon | |

| | |
|---------------------|---------------------------------|
| Sold to Emil Balley | Shipped to |
| Merrill, Oregon | in Klamath Ice and Cold Storage |
| | warehouse—Klamath Falls, Oregon |

| Quantity | Description | Price | Total |
|----------|---|-------|--------|
| 411 | 100 lb US ONE Goldseal brand russets fob | 1.45 | 595.95 |

[13]

State of Oregon,
County of Klamath—ss.

I, the undersigned, one of the attorneys for the complainant, do hereby certify that I have prepared the foregoing copy of complaint, and have carefully compared the same with the original thereof; that it is a correct transcript therefrom and of the whole thereof.

Klamath Falls, Oregon, dated this 26th day of April, 1941.

WILSON S. WILEY [14]

ANSWER TO COMPLAINT

Comes Now James Tozzi, doing business as James Tozzi & Company, and in answer to the said Complaint, admits, denies and alleges as follows:

I.

Admits Paragraph One of said Complaint.

II.

Admits Paragraph Two of said Complaint.

III.

Admits Paragraph Three of said Complaint.

IV.

Admits Paragraph Four of said Complaint except as limited herein, to wit: In this connection respondent alleges that the agreed price of the potatoes so sold was One and 45/100 (\$1.45) Dollars per hundredweight plus accrued storage charges.

V.

Admits the allegations of Paragraph Five of said Complaint except as modified herein, to wit: Respondent alleges that the agreed and total purchase price was Fifteen Thousand Seven Hundred Thirty-three and 95/100 (\$15,733.95) Dollars plus accrued storage charges. Respondent alleges that if said sum of money had been paid to him, he would have delivered said potatoes unto said Complainant.

VI.

Denies the allegations of Paragraph Six of said Complaint except as herein admitted and in this connection respondent further alleges that Complainant in pursuance with the oral agreement to purchase said potatoes for the sum of One and 45/100 (\$1.45) Dollars per hundredweight plus accrued storage charges, did pay to and there was received by Respondent on or about April 1, 1940, the sum of Twenty-Five Hundred (\$2500.00) Dollars.

VII.

Admits the allegations of Paragraph Seven except as herein modified and in this connection Respondent alleges that the oral agreement for the [15] purchase and sale of said potatoes was for the purchase price of One and 45/100 (\$1.45) Dollars per hundredweight plus accrued storage charges.

VIII.

Denies each and every allegation of Paragraph Eight of said Complaint except as admitted herein

and in this connection Respondent alleges that Complainant and Respondent did meet on April 6, 1940, pursuant to agreement. Respondent denies that Complainant at that time had in his possession and was ready, willing and able to pay either the sum of Thirteen Thousand Two Hundred Thirty-Three and 95/100 (\$13,233.95) Dollars or the total purchase price as claimed by Respondent, which is the last named sum plus accrued storage charges. Respondent is informed and believes and thereupon alleges that at no time during the progress of this transaction was Complainant in a position financially to carry through with his agreement to purchase and pay for said potatoes.

IX.

Denies each and every allegation of Paragraph Nine of said Complaint.

X.

Admits the allegations of Paragraph Ten of said Complaint that Complainant did personally communicate with Respondent at his office in Stockton, California, in which communication he claimed that one Streeter as agent of Respondent had quoted to him these potatoes for the sum of One and 40/100 (\$1.40) Dollars per hundredweight plus accrued storage charges. That he, Complainant, was unable or unwilling to carry through with said contemplated purchase and sale of said potatoes and abandoned the same. That later he again contacted the agent of Respondent and was then given

a quotation of One and 45/100 (\$1.45) Dollars per hundredweight and, as Complainant stated, that this second quotation said nothing with respect to the payment of the accrued storage. That Complainant stated that his interpretation of the second quotation was that whereas the price under the first quotation was One and 40/100 (\$1.40) Dollars per hundredweight plus accrued storage, that the second quotation was only One and 45/100 (\$1.45) Dollars because the said agent did not mention the question of storage. Respondent states that in writing he notified Complainant that if the latter would pay in cash the balance of the purchase price in accordance [16] with his contention, to wit Thirteen Thousand Two Hundred Thirty-three and 95/100 (\$13,233.95) Dollars as computed upon a straight price of One and 45/100 (\$1.45) Dollars per hundredweight without storage, that the question of whether or not the alleged quotation made to him by the said agent Streeter included storage as an additional part of the purchase price should be submitted to arbitration.

Respondent further alleges that Complainant did not reply to this offer of respondent and at no time since April 1, 1940, has Complainant ever offered the aforesaid sum of Thirteen Thousand Two Hundred Thirty-three and 95/100 (\$13,233.95) Dollars or any other sum of money as the balance remaining unpaid upon said potatoes, and further that Complainant at no time has ever offered or agreed to pay any portion of the accrued storage upon said potatoes.

XI.

Denies each and every allegation in Paragraph Eleven of said Complaint.

XII.

Denies the allegations contained in Paragraph Twelve of said Complaint except as admitted herein: In this connection Respondent alleges that he in fact did receive Twenty-Five Hundred (\$2500.00) Dollars as a down payment on or about April 1, 1940, as upon the purchase price of said potatoes under an oral agreement to buy and sell the same as he, said Respondent, has alleged herein. He further alleges that Complainant has refused and failed to carry out the agreement for the purchase of said potatoes and by reason thereof the said respondent has been damaged in the sum far in excess of the aforesaid Twenty-Five Hundred (\$2500.00) Dollars which he has received from said Complainant. That by reason thereof he, the said Respondent, is not indebted unto the said Complainant in any sum of money whatsoever.

XIII.

Denies each and every allegation in Paragraph Thirteen of said Complaint.

Wherefore, Respondent prays that Complainant take nothing and that [17] he, Respondent, be awarded his costs of suit herein and whatever other and further relief as the Secretary of Agriculture may deem meet and proper in the premises.

Dated: July 3, 1941. Stockton, California.

JAMES TOZZI

Respondent

SMALLPAGE and MACOMBER

Attorneys for Respondent.

Savings and Loan Building,
Stockton, California. [18]

State of California,

County of San Joaquin—ss.

James Tozzi, being first duly sworn, deposes and says: That he is the Respondent in the above-entitled action; that he has read the foregoing Answer to Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to such matters he believes it to be true.

JAMES TOZZI

Subscribed and sworn to before me this 3rd day of July, 1941.

(Seal)

FORREST E. MACOMBER

Notary Public in and for the County of San Joaquin, State of California. [19]

AMENDMENT TO ANSWER TO COMPLAINT

Comes now the above named Respondent and makes and files this, his first amendment to his answer to said Complaint, alleging, admitting and denying as follows:

I.

Alleges that the Complainant has no legal capacity to sue or bring this proceeding in that Respondent is informed and believes and thereupon alleges that at the time of the initiation of this proceeding Complainant was a minor and by reason thereof the said Complainant must be represented in any legal proceeding by a guardian, duly appointed, qualified and acting therefor. That any judgment rendered either against or for the said Complainant would not be binding upon either the Complainant or the Respondent.

II.

And for a further answer unto said Complaint, Respondent alleges that on or about May, 1940, the cause of action set forth in said complaint was duly settled and discharged between Respondent and Complainant by the making of a new contract between them wherein and whereby the said Complainant waived the alleged cause of action against this Respondent and agreed that he would accept a division of profits that might be realized from what is known as the "Tule Lake-Streeter" contracts, said contracts originating in and around the Tule Lake section, covering specifically growers named McFall, Brown and Williams.

JAMES TOZZI

Respondent [22]

State of California,
County of San Joaquin—ss.

James Tozzi, being first duly sworn, deposes and says: That he is the Respondent in the above-entitled action; that he has read the foregoing Amendment to Answer to Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to such matters he believes it to be true.

JAMES TOZZI

Subscribed and sworn to before me this 17th day of March, 1942.

[Seal] LAFAYETTE J. SMALLPAGE
Notary Public in and for the County of San Joaquin, State of California. [23]

PROCEEDINGS, FINDINGS OF FACT,
CONCLUSIONS, AND ORDER

PROCEEDINGS

The complainant, Emil Balley, an individual of Merrill, Oregon, filed an informal complaint on April 13, 1940, and a formal complaint on May 5, 1941, in this proceeding, under the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 1940 ed, 499a et seq.), alleging that the respondent James Tozzi & Company, of Stockton, California, has breached the contract entered into in the course of interstate commerce between the complainant and

the respondent, in that the respondent has failed, neglected, and refused to deliver to the complainant 10,851 sacks of potatoes f.o.b. Klamath Falls, Oregon.

It is alleged by the complainant that during March, 1940, by oral contract, the respondent agreed to sell to the complainant 10,851 sacks of U. S. No. 1 potatoes at the agreed price of \$1.45 per cwt. The complainant further alleges that by mutual agreement the respondent was to deliver to the complainant the 10,851 sacks of potatoes for the total f.o.b. sum of \$15,733.95, payable \$2,500 on or about April 1, 1940, and the balance of \$13,233.95 to be paid by the complainant to the respondent on or about April 1, 1940. The complainant claims that the sum of \$2,500 was paid to the respondent's agent, William M. Streeter, on or about March 29, 1940, it being agreed by and between the parties that at a subsequent date the parties would meet for the purpose of paying and receiving the balance of the contract price. It is further claimed that the complainant and the respondent's agent, William M. Streeter, met on April 6, 1940, in accordance with a previous understanding and that at the time the complainant offered to pay the respondent's agent in full for the potatoes in exchange for a clear title to the produce. The respondent's agent, it is stated by the complainant, refused to deliver clear title to the produce, demanding that the complainant assume payment of the storage thereon and that thereafter the respondent failed to deliver any of the potatoes and that by reason of the respondent's

breach of contract the complainant suffered damages in the amount of \$2,500, representing the advance payment, together with interest thereon, plus an amount of \$3,000 which the complainant claims as damages [24] sustained because of the breach of contract. The complainant claims damages, therefore, in the total sum of \$5,500 plus interest.

The respondent admits the existence of a contract but claims that the price agreed upon was \$1.45 per cwt., plus accrued storage charges. Respondent states that the total agreed purchase price was \$15,733.95, plus accrued storage charges, and states that if said sum of money had been paid the potatoes would have been delivered to the complainant. The respondent admits receipt of the sum of \$2,500 from the complainant but claims that the complainant refused and failed to carry out the agreement entered into and by reason thereof the respondent has been damaged in a sum far in excess of the amount of \$2,500, admittedly received from the complainant. By reason of this, the respondent denies indebtedness to the complainant in any amount whatsoever.

The main issue in this case is the actual terms of the contract with respect to the price agreed upon. The complainant claims that the price was \$1.45 per cwt., f.o.b., free of any and all storage charges. The respondent claims that the price agreed upon was \$1.45 per cwt., f.o.b., plus accrued storage charges. In addition to this issue is the question of damages. The complainant seeks to recover, in addition to the \$2,500, an advance payment made, dam-

ages in the amount of \$3,000, representing prospective or anticipated profits. The respondent admits receipt of the sum of \$2,500 from the complainant but claims that it was damaged far in excess of the sum received from the complainant because of the failure of the complainant to fulfill his part of the contract.

A hearing was held on March 18, 1942, at Stockton, California. Wilson S. Wiley, and G. Q. D'Albini, appeared for the complainant, and Lafayette J. Smallpage, and Forrest E. Macomber, appeared for the respondent. On March 18, 1942, before the Examiner, the respondent filed an amended answer to the complaint, in which he set forth the further defenses that the complainant because he was a minor had no legal capacity to sue or bring this proceeding and that in May 1940, the complainant entered into a new contract with the respondent by agreeing to accept a division of profits that might be realized from future contracts of sale of said potatoes, which the respondent [25] had under contract with growers, in satisfaction of whatever rights or moneys were due him under the former contract.

At the time of filing the amended answer to the complaint the respondent also made and filed a motion to dismiss the proceedings on the ground that the complainant is, and was, a minor without capacity to sue. This motion was later denied and the complainant required to appear by guardian ad litem.

The record shows that there was no written contract signed by either the complainant or the respondent in any of their negotiations. There was, however, placed in evidence by the complainant a cancelled check dated April 1, 1940, payable to the order of James Tozzi & Company, in the amount of \$2,500, which check was paid by the First National Bank of Portland, Oregon, for the account of James Tozzi & Company. The face of the check carries this notation in the handwriting of Emil Balley, "Advance on 30 carloads of potatoes at \$1.45 per cwt. potatoes grade U. S. No. 1, Size A." The complainant introduced 30 invoices of James Tozzi & Company issued in connection with the transaction under consideration. These invoices showed the shipping point as Klamath Falls, Oregon, and the terms of the sale to Emil Balley as "100 lb. U. S. One Goldseal brand russets f.o.b. price \$1.45." The invoices contained no reference to storage charges.

The testimony and the record show that the respondent, subsequent to his failure to perform under his contract with the complainant, sold or disposed of the 10,851 sacks of potatoes, the subject matter of the contract, and received therefor, as net proceeds, \$18,205.51. This was an increase of \$2,471.56 over the amount the respondent would have received if the contract between the complainant and the respondent had not been breached.

FINDINGS OF FACT

1. The complainant, Emil Balley, is an individual whose post office address is Merrill, Oregon.

2. The respondent, James Tozzi & Company, is a sole proprietorship owned by James Tozzi, whose post office address is Stockton, California. The respondent was duly licensed under the Perishable Agricultural Commodities Act [26] 1930, during all of the times mentioned in the complaint.

3. On or about April 1, 1940, the complainant entered into a contract with the respondent in the course of interstate commerce, for the purchase of 10,851 sacks of potatoes f.o.b. Klamath Falls, Oregon, for the sum of \$15,733.95.

4. On or about April 1, 1940, the complainant paid to the respondent \$2,500 which sum was to be applied on the purchase price.

5. The sum of \$2,500 paid by the complainant to the respondent at the time of the consummation of the contract has never, nor has any part thereof, been repaid by the respondent to the complainant.

6. On or about April 6, 1940, the complainant tendered to the respondent a check in the amount of \$13,233.95, being the balance due under the contract, but the tender of the above-named sum was refused by the respondent.

7. The respondent failed and refused to deliver to the complainant the 10,851 sacks of potatoes, the subject matter of the contract, on or about April 6, 1940, and has continued to do so since that time.

8. Subsequent to the respondent's failure to per-

form under its contract with the complainant the respondent sold or disposed of the 10,851 sacks of potatoes and received therefor as net proceeds, \$18,205.51. This was an increase of \$2,471.56 over the amount the respondent would have received had it not breached its contract with the complainant.

9. The cause of action arose on or about April 6, 1940, and an informal complaint was filed on April 13, 1940, which was within the nine months period allowed under the act for the filing of a claim for reparation.

CONCLUSIONS

The Circuit Court of the State of Oregon having appointed a guardian ad litem for the complainant, there remains no question as to his legal capacity as a minor to bring this action. It is further concluded that the evidence fails to show that the complainant agreed to pay the storage charges, and, therefore, when the respondent refused to deliver the 10,851 sacks of potatoes because the complainant would not do so, the respondent breached the contract [27] entered into between the parties. The evidence also fails to sustain the respondent's claim that a new contract was entered into. A novation is never presumed but must be established by the full discharge of the original debt, by the express terms of the agreement, or by actions of the parties whose intentions must be clear. *Henry v. Hubert*, 35 S. W. 444, 448 (Tenn.)

Since it is clear that the respondent has breached its contract with the complainant by failing to de-

liver to the complainant 10,851 sacks of potatoes, there only remains the question as to what amount the complainant has been damaged. As a general rule, profits which would have been realized by the purchaser if a contract had been performed may be recovered as damages for its breach, provided they are susceptible of being ascertained with reasonable certainty. *Avil Mining Company v. Humble*, 135 U. S. 540. The evidence in this case does not show with reasonable certainty the profits that the complainant would have realized had the respondent not breached the contract with the complainant. However, the evidence does show that the complainant did everything that he was required to do under the contract, namely, that he paid to the respondent \$2,500 as part payment of the purchase price and tendered to the respondent the balance of the said purchase price which the respondent refused to accept. Under these circumstances the complainant became the equitable owner of the potatoes, and the complainant may consider the respondent's resale of the potatoes as having been made for complainant's account. Therefore, the complainant is entitled to receive from the respondent any amount in excess of the contract price (\$15,733.95) received by the respondent in connection with the particular lot of potatoes. The respondent received \$2,500 from the complainant and \$18,205.51 from the purchaser on the resale, or a total of \$20,705.51 which represents receipts of \$4,971.56 in excess of the contract price. The complainant should, therefore, be awarded \$4,971.56 with interest, and the facts

and circumstances, as herein set forth, should be published.

ORDER

It Is Ordered that within 30 days from the date of this order the respondent, James Tozzi & Company, Stockton, California, shall pay to the [28] complainant, Emil Balley, Merrill, Oregon, as reparation, the sum of \$4,971.56, with interest thereon at the rate of 5 per cent per annum, from April 6, 1940, until paid.

It Is Further Ordered that the facts and circumstances, as herein set forth, shall be published.

It Is Further Ordered that copies hereof shall be served upon the parties and that, except as to payment of reparation and service upon the parties, this order shall become effective 20 days after its date.

Done at Washington, D. C., this 14th day of December, 1942.

Witness my hand and the seal of the Department of Agriculture.

(Seal)

THOMAS J. THOMAS

Assistant to the Secretary of
Agriculture

Rufe Edwards:: wmc

11 18 1942 [29]

PETITION ON APPEAL

Now comes the defendant above-named, James Tozzi, doing business as James Tozzi & Company, and files this, his Petition on Appeal from the Order, Proceedings, Findings of Fact and Conclusions of the Secretary of Agriculture, filed in the office of the Secretary of Agriculture in Washington, D. C., on December 14th, 1942, bearing proceeding number P.A.C.A. Docket No. 4010, and states as follows:

The plaintiff, Emil Balley an individual of Merrill, Oregon, filed an informal Complaint on April 13th, 1940, under the Perishable Agricultural Commodities Act, 1930 (7 U.S.C.A. 499a et seq.) and thereafter on May 5th, 1941, filed a formal Complaint under said act alleging that the defendant James Tozzi, doing business as James Tozzi & Company of Stockton, California, had breached a certain contract made in the course of interstate commerce between plaintiff and defendant in that the defendant had failed, neglected and refused to deliver to the plaintiff, ten thousand eight hundred fifty-one (10,851) sacks of potatoes, f.o.b. Klamath Falls, Oregon. An Answer and an Amended Answer were filed, answering the complaint and a hearing was held on March 18th, 1942, before H. D. Dechant, Examiner, at Stockton, California.

The complaint alleged that in March, 1940, by oral contract, defendant agreed to sell plaintiff 10,851 sacks of U. S. No. 1 potatoes, then in storage at Klamath Falls, Oregon, at the agreed price

of \$1.45 per cwt., f.o.b. Klamath Falls, Oregon, the purchase price to be payable \$2500.00 on or about April 1st, 1940, and the balance of \$13,233.95 payable on or about April 6th, 1940. Plaintiff paid the sum of \$2500.00 to defendant's agent and the complaint alleges that defendant failed to deliver any of the potatoes and that by reason of the defendant's breach of contract the plaintiff Emil Balley suffered damage in the sum of \$2500.00 representing the advance payment, together with interest thereon, plus an amount of Three Thousand (\$3,000.00) Dollars, which the plaintiff Emil Balley claims as damages sustained because of the breach of contract.

The issues at the trial were: [30]

1. Was any contract in fact made between plaintiff Emil Balley and defendant James Tozzi, doing business as James Tozzi & Company.

2. If such a contract were made, was the purchase price for the potatoes fixed at \$1.45 per cwt. plus accrued storage charges, or was the price \$1.45 per cwt. clear of all storage charges?

3. If such a contract were made, and if the price of potatoes under said contract were \$1.45 per cwt. clear of storage charges, was plaintiff ready, able and willing to perform within the time limitations of his option of March 29th, 1940?

4. If such a contract were made and if plaintiff were ready, able and willing to perform within the time limitation, was there a novation of said contract?

5. If such a contract were made as alleged by the plaintiff and the same were breached by the defendant, what damage if any was shown by plaintiff to have been sustained by him as a result of the breach thereof by defendant?

6. If such a contract were made, was such a contract one within the Statute of Frauds?

At the time of the Hearing, testimony both oral and documentary was introduced in evidence by both parties. Thereafter and on December 14th, 1942, the Secretary of Agriculture made and filed his Findings of Fact, Conclusions and Order of Reparation; that said Order directs the defendant to pay to plaintiff Emil Balley as reparation the sum of Four Thousand Nine Hundred Seventy-One and 56/100 (\$4,971.56) Dollars with interest thereon at the rate of five (5) per cent per annum from April 6th, 1940.

The grounds upon which Petitioner James Tozzi, doing business as James Tozzi & Company, relies to defeat the right of plaintiff Emil Balley to recover the damages claimed are as follows:

1. That the Findings of Fact Numbered 3, 6 and 8 as set forth in the Proceedings, Findings of Fact, Conclusions and Order of the Secretary of Agriculture, filed in Washington, D. C., on December 14th, 1942, are not [31] supported by the evidence, particularly for the reason that the evidence showed that there was no legally enforceable contract made or entered into between Plaintiff Emil Balley and defendant James Tozzi doing business as James Tozzi & Company; and the evidence further showed

that if a legally enforceible contract was in fact entered into between the parties, the purchase price for the potatoes was fixed at \$1.45 per cwt. plus accrued storage charges; and the evidence further showed that if a legally enforceible contract was entered into by the parties hereto, the plaintiff Emil Balley was in default therein in that he was not able, or ready, or willing to perform within the time limitation contained therein; and the evidence further showed that there was a novation which resulted in a complete abandonment of any prior contract made between plaintiff Emil Balley and defendant James Tozzi, doing business as James Tozzi & Company.

2. That the Conclusions of Law are not supported by the Findings of Fact or by the evidence, for the reason that there is no Finding whatever that the plaintiff Emil Balley sustained any damage whatsoever by reason of any breach of contract by the defendant James Tozzi, doing business as James Tozzi & Company, nor was there any evidence of any damage sustained by plaintiff Emil Balley as a result of defendant James Tozzi, doing business as James Tozzi & Company, breach of contract, if in fact any legally enforceible contract was entered into by the parties hereto.

3. That the Order appealed from by defendant James Tozzi, doing business as James Tozzi & Company, is insufficient in that it finds no support in the evidence or the Findings of Fact or the Conclusions thereon, for the reasons hereinabove set forth.

Wherefore, Defendant, James Tozzi, doing business as James Tozzi & Company, prays for a trial de novo before the above-entitled United States District Court.

SMALLPAGE and MACOMBER
Attorneys for Defendant and
Appellant, James Tozzi, doing
business as James Tozzi & Company. [32]

State of California,
County of San Joaquin—ss.

James Tozzi, being first duly sworn, deposes and says: That he is the defendant and appellant in the above-entitled matter; that he has read the foregoing Petition on Appeal and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are therein stated on information and/or belief, and as to such matters that he believes them to be true.

JAMES TOZZI

Subscribed and sworn to before me this 7th day of January, 1943.

(Seal) LAFAYETTE J. SMALLPAGE
Notary Public in and for the County of San Joaquin, State of California.

[Endorsed]: Filed Jan. 11, 1943. Walter B. Maling, Clerk. [33]

NOTICE OF APPEAL

Notice is hereby given that James Tozzi, doing business as James Tozzi & Company, defendant above-named, hereby appeals to the United States District Court, in and for the Northern District of California, Northern Division, from the Reparations Award and Order and the Proceedings, Findings of Fact and Conclusions in connection therewith of the Secretary of Agriculture, which Order, Proceedings, Findings of Fact and Conclusions were made and filed at Washington, D. C., on December 14th, 1942, bearing proceeding number P.A.C.A. Docket No. 4010.

This appeal is taken under the provisions of Paragraphs C & D of Section 7 of the "Perishable Agricultural Commodities Act, 1930, as amended" (7 U.S.C.A. Paragraph 499 G).

SMALLPAGE AND MACOMBER,
Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Jan. 11, 1943. [34]

STIPULATION

(Regarding Evidence and Testimony in
United States District Court)

(1) It is stipulated that at the trial of the afore-said matter there may be received in evidence without objections by either plaintiff or defendant the testimony of witnesses Richard Emil Balley, Mrs.

Anna Svehek, Mrs. R. E. Balley, Claude M. Aunger, Willard Hill and James Tozzi, and

(2) It is further stipulated that the presence of said witnesses shall be dispensed with and that their testimony, as given before the Honorable H. D. Dechant, Examiner, for the United States Department of Agriculture on March 18 and 19, 1942, shall be admitted in evidence through the medium of certified copies of the Reporter's Transcript of said evidence.

(3) It is further stipulated that the depositions of witnesses Humble and Tillotson and the sworn statement of Wm. Streeter may likewise be shown in evidence.

(4) It is further stipulated that Plaintiff and Respondent may offer in evidence the following Exhibits as hereinafter designated upon the records of the Honorable H. D. Dechant. The burden of preparing and introducing such Exhibits shall be upon the Party offering the same.

(5) The opposing Party in his brief may object to the receipt of such testimony and the Court shall then pass upon the admissibility of the same:

(6) Emil Balley, Plaintiff and Respondent, now offers in evidence the following Exhibits:

Numbers 1-2-3-4-5-7-9-G.

Proceedings—Findings of Fact—Conclusions and Order of Secretary of Agriculture.

Reports of field agents Hilgeson and Dykes.

(7) James Tozzi, Defendant and Appellant, now offers the following Exhibits in evidence:

Numbers 6-7-8-9 and A-B-C-E-F-G-H.

(8) The Court shall fix Counsel fees.

WILSON S. WILEY,

Attorney for Plaintiff and

Respondent. [37]

SMALLPAGE AND MACOMBER,

Attorneys for Defendant and

Appellant.

[Endorsed]: Filed Nov. 17, 1943. C. W. Calbreath, Clerk. [38]

OPINION AND ORDER

On the trial de novo of the claim of Emil Balley, the plaintiff and respondent, against James Tozzi, the defendant and appellant, for damages for breach of contract to sell to respondent 10,851 sacks of potatoes, I have weighed the evidence introduced before me to determine whether the plaintiff and respondent has established his claim by a preponderance of the evidence,—giving due regard, as required by statute, to the effect of the findings, conclusions and order of the Secretary of Agriculture as prima facie evidence of the facts therein stated. I have excluded from my consideration the reports of W. A. Hilgeson and J. W. Dykes, containing as they do, pure hearsay evidence incompetent in a court of law. And the objection of the appellant to the admission of these reports as evidence in this court is sustained. I am nevertheless satisfied from my examination of the competent evidence introduced before me by stipulation of the parties filed

herein, that the greater weight of the same is in favor of the facts as found by the Secretary of Agriculture; and his findings will therefore be those of this court with the following addition to the Secretary's Finding No. 8:—That the sum of \$18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon. My additional finding in this regard implies not that the basis for the measurement of damages adopted by the Secretary of Agriculture is erroneous, but that whether the transaction be regarded as a sale, or as a contract of sale, the amount of damages as fixed by the Secretary of Agriculture, for the refusal of appellant to deliver the potatoes to respondent was, in my opinion, justified by the evidence and applicable law.

Judgment will be in favor of the plaintiff and respondent and against the defendant and appellant in the sum of \$4,971.56, with interest thereon at the rate of 5% per annum from April 6, 1940 until paid, together with the further sum of \$250.00 as and for counsel fees, and with costs.

Findings of Fact, conclusions of law and judgment shall be prepared, [65] served and submitted by counsel for plaintiff and respondent, and counsel for defendant and appellant shall have five days thereafter within which to propose counter findings.

Dated: April 24, 1944.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed Apr. 24, 1944. [66]

NOTICE OF ORDER FOR JUDGMENT

You Are Hereby Notified that on Monday, April 24, 1944 Judge Martin I. Welsh Ordered that judgment be entered herein in favor of the plaintiff and respondent and against defendant and appellant in the sum of \$4,971.56 with interest thereon at the rate of 5% per annum from April 6, 1940, until paid, together with the further sum of \$250.00 as and for counsel fees, and with costs upon findings of fact and conclusions of law and judgment to be prepared and submitted by the attorney for the plaintiff and respondent.

C. W. CALBREATH,
Clerk, U. S. District Court.

Sacramento, California, April 25, 1944. [67]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Now on this day this matter coming on to be heard upon the motion of plaintiff and respondent, made in open Court, that the Court make and enter its Findings of Fact herein, and it appearing that nothing now remains to be done but to have the Court make and enter its Findings of Fact and Conclusions of Law, and

It appearing that this is an appeal from the "Proceedings, Findings of Fact, Conclusions, and Order," authorized by the provisions of the Perishable Agricultural Commodities Act, 1930, Docket No. 4010, made and published by the Secretary of

Agriculture of the United States, on December 14, 1942, in the above entitled cause, and

It appearing that the Secretary of Agriculture, after a formal hearing, held in Stockton, California, on March 18 and 19, 1942, did award to plaintiff and respondent, as reparation, the sum of \$4,971.56, with interest thereon at the rate of 5% per annum from April 6, 1940, until paid, and

It appearing that the defendant and appellant refusing to pay to the plaintiff and respondent the reparation award so made did challenge the sufficiency of the Findings of Fact, Conclusions, and Order, of the Secretary of Agriculture, and, in conformity to the provisions of Section 7 (c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 1940 ed. 499a et seq.) did file an appeal in this Court from said Order, and

It appearing that thereafter certified copies of the "Proceedings, Findings of Fact, Conclusions, and Order," together with the pleadings in the case, consisting of the complaint, as amended, and the answer, as amended, were duly filed in this Court by the Secretary of Agriculture, with the Clerk, upon having been advised by the Clerk that said appeal had been so perfected and filed, and

This action having come on for trial in this Court on the seventeenth day of November, 1943, Wilson S. Wiley, appearing as attorney for the plaintiff and respondent, and Lafayette J. Smallpage, appearing as the attorney for the defendant and appellant, and the respective parties hereto having filed herein [68] a stipulation in writing reserving

the right to opposing counsel to object to the receipt of evidence offered under said stipulation, agreeing, however, in said stipulation, that the testimony of all the witnesses given before the Examiner for the United States Department of Agriculture through the medium of certified copies of the reporter's transcript of such testimony, certified copies of all depositions and sworn statements may be so received, without objection, and

It appearing that thereafter all of the exhibits or documents mentioned and described in said stipulation were offered in evidence herein, and

It appearing that among said exhibits or documents offered in evidence herein were two separate written reports of investigations of the controversy herein involved made by J. W. Dykes and W. A. Hilgeson, representatives of the United States Department of Agriculture, to which offer in evidence objection was made as to the admissibility thereof by the defendant and appellant, and

It appearing that, in compliance with the order of the Court, respective counsel have filed written briefs with the Court, in support of their respective contentions, based upon the record filed herein, and the Court having duly considered the record in this case, and being fully advised as to the law and facts in the premises, makes the following

FINDINGS OF FACT

1. That plaintiff and respondent is an individual whose post office address is Merrill, Oregon.

2. That defendant and appellant is a sole proprietorship owned by James Tozzi, whose post office address is Stockton, California, duly licensed, under the provisions of the Perishable Agricultural Commodities Act, 1930, during all the times mentioned in the complaint, as amended.

3. That on or about April 1, 1940, the plaintiff and respondent entered into a contract with the defendant and appellant, in the course of interstate commerce, for the purchase of 10,851 sacks of potatoes f.o.b. Klamath Falls, Oregon, for the sum of \$15,733.95. [69]

4. That on or about April 1, 1940, the plaintiff and respondent paid to the defendant and appellant the sum of \$2,500.00, which sum was to be applied on the purchase price of the potatoes.

5. That the sum of \$2,500.00 paid by the plaintiff and respondent to the defendant and appellant at the time of the consummation of the contract has never, nor has any part thereof, been repaid by the defendant and appellant to the plaintiff and respondent.

6. That on or about April 6, 1940, the plaintiff and respondent tendered a check in the amount of \$13,233.95 to the defendant and appellant, being the balance due under the contract, but the tender of the above-named sum was refused by the defendant and appellant.

7. That the defendant and appellant failed and refused to deliver to the plaintiff and respondent the 10,851 sacks of potatoes, the subject matter of the contract, on or about April 6, 1940, and has continued to do so since that time.

8. That subsequent to the failure of the defendant and appellant to perform under its contract with the plaintiff and respondent, the defendant and appellant sold or disposed of the 10,851 sacks of potatoes and received therefor as net proceeds \$18,205.51, being an increase of \$2,471.56 over the amount the defendant and appellant would have received had it not breached its contract with the plaintiff and respondent; that the sum of \$18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon.

9. That the cause of action arose on or about April 6, 1940, and an informal complaint was filed on April 13, 1940, with the United States Department of Agriculture, which was within the nine months period allowed under the Act for the filing of a claim for reparation.

10. That by the terms of said contract the plaintiff and respondent did not agree to pay the storage charges, and, based upon the foregoing, and as [70]

CONCLUSIONS OF LAW

When the defendant and appellant refused to deliver the 10,851 sacks of potatoes because the plaintiff and respondent would not pay the storage charges, the defendant and appellant breached the

contract entered into between the parties, and, there has been excluded from consideration herein the reports of W. A. Hilgeson and J. W. Dykes, containing as they do pure, hearsay evidence incompetent in a Court of Law, and the objections of the defendant and appellant thereto are hereby sustained, it being considered however that the greater weight of competent evidence, introduced herein by stipulation of the parties, does sustain the facts as found by the Secretary of Agriculture.

That since the defendant and appellant breached its contract with the plaintiff and respondent by failing to deliver to the plaintiff and respondent the 10,851 sacks of potatoes, and, since the evidence shows that the plaintiff and respondent did everything that he was required to do under the contract, namely, that he paid to the defendant and appellant \$2,500.00 as part payment of the purchase price and tendered to the defendant and appellant the balance of the purchase price, the plaintiff and respondent is entitled to receive from the defendant and appellant any amount in excess of the contract price of \$15,733.95 received by the defendant and appellant in connection with the potatoes; that defendant and appellant did receive \$2,500.00 from the plaintiff and respondent and \$18,205.51 from the purchaser on the resale, said resale price not exceeding the fair market value thereof on April 6, 1940, or a total sum of \$20,705.51, which represents receipts of \$4,971.56 in excess of the contract price; and that plaintiff and respondent is entitled to judgment against the defendant and appellant in the

sum of \$4,971.56, with interest thereon at the rate of five per cent (5%) per annum from April 6, 1940, to the date of judgment to be entered herein, and thereafter at the lawful rate of interest, the additional sum of \$250.00 as attorney's fees, with costs taxed at \$10.00. [71]

Done and dated this 6th day of June, 1944.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed June 6, 1944. C. W. Calbreath, Clerk. [72]

[Title of Court and Cause.]

JUDGMENT

Now on this day this matter coming on to be heard, and it appearing to the Court that this Court has heretofore made, signed and filed its Findings of Fact and Conclusions of Law, the matter having heretofore been tried to the Court, and the Court now being fully advised as to what judgment should be rendered in the premises;

It Is Therefore Hereby Ordered and Adjudged that the plaintiff and respondent, Emil Balley, have and recover of and from the defendant and appellant, James Tozzi, doing business as James Tozzi & Company, the sum of Four Thousand Nine Hundred Seventy-One and 56/100ths Dollars (\$4,971.56), with interest on said sum of money at the rate of five per cent (5%) per annum from April 6, 1940, to the date hereof, and thereafter at the lawful rate

of interest; for the additional sum of Two Hundred Fifty and no/100ths Dollars (\$250.00) as attorney's fees, and the sum of Ten Dollars (\$10.00) as costs incurred herein.

Done and dated this 6th day of June, 1944.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed June 6, 1944. C. W. Calbreath, Clerk. [73]

District Court of the United States, Northern District of California, Northern Division

No. 4586

EMIL BALLEY

vs.

JAMES TOZZI

NOTICE

To: Wilson S. Wiley, Medical Dental Bldg., Klamath Falls, Ore. Smallpage & Macomber, Savings & Loan Bldg., Stockton, Calif.

You Are Hereby Notified that on June 6th, 1944 a Judgment was entered of record in this office in the above entitled case.

You Are Hereby Notified that on.....
a Notice of Appeal was filed by.....

in the above entitled case. A copy of which is enclosed herewith.

C. W. CALBREATH,
Clerk, U. S. District Court.

Sacramento, California, June 6th, 1944. [74]

MOTION FOR NEW TRIAL AND NOTICE
OF MOTION FOR NEW TRIAL

To Plaintiff and Respondent above-named and to Wilson S. Wiley and G. Q. D'Albini, Esq., 608-9 Medical Dental Building, Klamath Falls, Oregon, attorneys for Plaintiff and Respondent.

You and each of you will please take notice that on June 26, 1944, at 10:00 o'clock A. M., Defendant and Appellant will move the above-entitled Court, at the court room thereof, located in the Postoffice Building, Sacramento, California, to set aside the Findings of Fact and Conclusions of Law, in the above-entitled action, and the Judgment in the above-entitled action, and will move said Court for a new trial upon the following grounds, to-wit:

1. Insufficiency of evidence to justify the decision, in this, that there was no evidence whatsoever introduced in this case to show the fair market value of potatoes, the subject matter of the action, on April 6, 1940, at Klamath Falls, Oregon.

2. That the Findings of Fact and Conclusions of Law herein are not supported by the evidence in this, that there is no testimony whatsoever to

support Finding #8 of the Findings of Fact, for the reason that no evidence whatsoever was introduced which would show the fair market value of the potatoes, the subject matter of the action, at Klamath Falls, Oregon, on or about April 6, 1940.

3. That the Judgment rendered herein is against law in this: that the burden was upon Plaintiff to prove damages, if any he sustained, and no damages were proven for the reason that under the law, the only damages that Plaintiff could have sustained, were measured by the difference between the price at which Plaintiff purportedly purchased said potatoes and the reasonable value of the potatoes at the time and place of sale and there was no evidence whatsoever as to the reasonable value of a like grade of potatoes at the time and place of sale, to- [75] wit: April 6, 1940, Klamath Falls, Oregon.

Said motion will be made and based on the records and files in the above-entitled action and upon the evidence introduced therein and the minutes of the Court.

Dated: June 9, 1944.

SMALLPAGE AND MACOMBER,
Attorneys for Defendant and
Appellant.

[Endorsed]: Filed June 10, 1944. C. W. Calbreath, Clerk. [76]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 3rd day of July, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District.

[Title of Court and Cause.]

No. 4586

The motion for a new trial having been heretofore heard and submitted, being now fully considered, it is Ordered that the motion for a new trial be and the same is hereby denied. [77]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that James Tozzi, doing business as James Tozzi & Company, Defendant above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the 6th day of June, 1944,

in favor of Plaintiff above-named and against this Defendant.

SMALLPAGE AND MACOMBER,
Attorneys for Defendant and
Appellant,
511 Savings and Loan Building,
Stockton, California,
Phone: 4-4725.

[Endorsed]: Filed July 12, 1944. C. W. Calbreath, Clerk. [78]

SUPERSEDEAS BOND

Know All Men By These Presents:

That I, James Tozzi, doing business as James Tozzi & Company, as principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut, and duly authorized to transact a general surety business in the State of California, as surety, are held and firmly bound unto Emil Balley, in the sum of Eight Thousand and no/100 (\$8,000.00) Dollars, to be paid to the said Emil Balley; his attorney, successors, or assigns, to which payment we bind ourselves, our successors, or assigns, jointly and severally.

Sealed with our seals and dated this 10th day of July, 1944.

Whereas, on June 6, 1944, in an action in the District Court of the United States, for the Northern District of California, Northern Division, be-

tween Emil Balley, Plaintiff, and James Tozzi, doing business as James Tozzi & Company, Defendant, a Judgment was rendered against the said James Tozzi has duly filed a Notice of Appeal from said Judgment.

Now, the condition of this Bond is that if the said James Tozzi, doing business as James Tozzi & Company, shall prosecute his appeal with effect and satisfy the said Judgment in full, together with costs, interest, attorney fees, and damages for delay, if for any reason the appeal is dismissed and if the Judgment is affirmed and satisfied in full or such modification of the Judgment and such costs, interest, attorney fees, and damages as the Appellate Court may adjudge and award then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, the said principal has hereunto set his hand and the said surety has caused its corporate name and seal to be attached by its duly authorized attorney-in-fact at Stockton, California, this 10th day of July, 1944.

JAMES TOZZI, doing business as
James Tozzi & Company,
Principal,

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

By A. E. GIANELLI,
Attorney-in-fact,
Surety. [79]

State of California

County of San Joaquin—ss.

On this 10th day of July, 1944, before me, the undersigned, Notary Public in and for the County and State aforesaid, residing therein, duly commissioned and sworn, personally appeared James Tozzi, known to me to be the person described in and whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

FORREST E. MACOMBER,

Notary Public in and for said
County and State.

State of California

County of San Joaquin—ss.

On this 10th day of July, in the year one thousand nine hundred and forty four before me, P. J. Riordan, a Notary Public in and for said County of San Joaquin, residing therein, duly commissioned and sworn, personally appeared A. E. Gianelli known to me to be the Attorney in Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in the said County of San Joaquin, the day and year in this certificate first above written.

[Seal] P. J. RIORDAN,
Notary Public in and for the County of San Joaquin, State of California. [80]

Approved this 12th day of July, 1944.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed July 12, 1944. C. W. Calbreath, Clerk. [81]

In the United States District Court, in and for the
Northern District of California, Northern
Division

No. 4586

EMIL BALLEY.

Plaintiff and Respondent,

vs.

JAMES TOZZI, doing business as JAMES TOZZI
& COMPANY,

Defendant and Appellant.

STATEMENT OF POINTS

The Appellant states that the points upon which he intends to rely in the appeal in this action are as follows:

1. That the judgment rendered herein is against law in this; that the burden was upon Plaintiff to prove damages, if any he sustained, and no damages were proven for the reason that under the law, the only damages that Plaintiff could have sustained, were measured by the difference between the price at which Plaintiff agreed to pay Defendant for seed potatoes and the reasonable value of a like grade of potatoes at the time and place of sale, and there was no evidence whatsoever as to the reasonable value of a like grade of potatoes at the time and place of sale, to-wit: April 16, 1940 in Klamath Falls, Oregon.

2. That the evidence was insufficient to justify the judgment in [82] this; that there was no evidence whatsoever introduced in this case to prove what, if any, damages were sustained by Plaintiff as a result of the breach of contract by Defendant.

3. That the *finds* of fact and conclusions of law herein are not supported by the evidence in this; and there is no evidence whatsoever to support Finding No. 8 of the Findings of Fact for the reason that no evidence whatsoever was introduced which would show what, if any, damages were sustained by the Plaintiff as a result of the breach of contract by Defendant.

SMALLPAGE & MACOMBER,
Attorneys for Appellant.

[Endorsed]: Filed July 19, 1944. C. W. Calbreath, Clerk. [83]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 89 pages, numbered from 1 to 89, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Emil Balley vs. James Tozzi, doing business as James Tozzi & Co., No. 4586, Civil, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designations of Contents of Record on Appeal, copies of which are embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the sum of Fourteen and 80/100 (\$14.80), Dollars, and that the same has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and the official seal of said District Court, this 11th day of August, A. D. 1944.

[Seal]

C. W. CALBREATH,

By F. M. LAMPERT,

Deputy Clerk. [90]

[Endorsed]: No. 10848. United States Circuit Court of Appeals for the Ninth Circuit. James Tozzi, doing business as James Tozzi & Co., Appellant, vs. Emil Balley, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed August 12, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

In the United States District Court, in and for the
Northern District of California, Northern Division.

No. 4586

EMIL BALLEY,

Plaintiff and Respondent.

vs.

JAMES TOZZI, doing business as JAMES TOZZI
& COMPANY,

Defendant and Appellant.

STIPULATION AS TO RECORD ON APPEAL

It is hereby stipulated by the Attorneys for the re-

spective parties hereto, that the following constitute the Transcript of Record on Appeal:

1. Complaint with Amendments.
2. Answer with Amendments.
3. Proceedings, Findings of Fact, Conclusions, and Order made, entered and published by the Secretary of Agriculture of the United States, December 14, 1942. (PACA Docket No. 4010.)
4. Petition on Appeal to United States District Court.
5. Notice of Appeal to United States District Court.
6. Stipulation regarding evidence and testimony in United States District Court.
7. Opinion and Order of the United States District Court.
8. Findings of Fact and Conclusions of Law United States District Court.
9. Judgment of United States District Court.
10. Defendants Motion for a New Trial and Order Denying a new Trial.
11. Notice of Appeal to Circuit Court of Appeals.
12. Supersedeas Bond on Appeal to Circuit Court of Appeals.
13. Statement of Points on Appeal.
14. This Stipulation.
15. Condensed Statement of the evidence as follows:

STIPULATED CONDENSED STATEMENT
OF EVIDENCE

PLAINTIFF'S WITNESSES

(a) RICHARD EMIL BALLEY

After I completed school, in the fall of 1939 and spring of 1940, I engaged in the business of buying and selling potatoes. Prior to that time I had about five or six years experience in the potato business with C. V. Barton, and worked with my father raising and marketing potatoes. I did business with the L. A. Potato Distributors at Los Angeles, California; Dunbar McManus Company, San Francisco, and United Brokerage Company, of Portland, Oregon. (17, 18).

On or about March 29, 1940, I purchased thirty carloads of cold storage potatoes, stored at the Klamath Ice and Cold Storage plant, in Klamath Falls, Oregon, from James Tozzi, at his branch office, through his representative, William M. Streeter, giving him at that time a check, payable to James Tozzi & Company, in the amount of \$2500.00 as an advance payment on the purchase price of the potatoes. (19, 20).

Exhibit No. 1 is the original check for \$2500.00, copy of which is attached to the complaint and made a part thereof, and on this check is a notation as follows: "Advance on 30 carloads of potatoes 1.45 per cwt. potatoes grading US No. 1 Size A," (22) and it is shown thereon that the check was cashed March 30, 1940.

I gave Mr. Streeter, the representative of James

Tozzi & Company, this check for \$2500.00 on March 29, 1940 (20) with the understanding that this check would be held until April 1, 1940, so as to allow me to get in drafts and check my bank accounts to make sure the check would be valid at the bank at the time it was received, I having Saturday and Monday forenoon to make arrangements. On Monday I went to the bank and talked to Mr. Tillotson and told him there would be another check come in for \$13,000.00 or \$14,000.00 and at that time we made arrangements for the entire sum for the purchase of the Tozzi potatoes. (22, 23).

I received thirty invoices from the agent of James Tozzi & Company for these potatoes right around the 4th or 5th of April, 1940. (25)

Exhibit No. 2 consists of 30 invoices, one invoice for each of the thirty cars, copies of which invoices are attached to the complaint, or a total of 10,851 sacks of potatoes, each invoice bearing a notation thereon as follows: "100 lb. US One Goldseal brand russets FOB, price \$1.45." Some brands "Malin" instead of "Goldseal").

The potatoes were in Klamath Falls and they were to be delivered f.o.b. at Klamath Falls. (29). Prepared a contract. (30)

Mr. Smallpage: Before it is admitted, may I interrogate the witness?

Mr. Dechant: Yes.

Mr. Smallpage: Did I understand your counsel or attorney drew that contract?

The Witness: No, I drew that contract.

Mr. Smallpage: You drew it yourself?

The Witness: Yes, it was from a form that the Zuckerman and Company prepared, and it was sent by the L. A. Potato distributors of Los Angeles, California, one of their contract forms. I drew this myself from that form.

Mr. Smallpage: When did you draw it with respect to this giving of this \$2500.00 check?

The Witness: I drew that there on April 2nd or 3rd. (30, 31)

Mr. Dechant: Was that after the check, Exhibit 1, was delivered to Tozzi?

The Witness: Yes, it was. (32)

At the time the check was paid there was an understanding we would both reduce the agreement to writing. (33) I refused his contract and he refused mine on or about April 3rd or 4th. We had disagreed on this matter of the payment of storage (33).

So when I walked away he said: "I will see you the latter part of the week for payment," and I said: "All right, we will meet the latter part of the week for payment," which was April 6th. (33)

Direct Examination

Q. Did you meet with him on April 6th?

A. Yes, I did.

Q. Where did you meet him?

A. I met him at the First National Bank of Portland, at Merrill, Oregon.

Q. For what purpose did you meet him?

A. I met him to tender the balance payment of this agreement.

Q. How much did the balance payment amount to?

A. To the best of my knowledge, somewhere right around \$13,233.

Q. Did you tender that sum of money to him on that date at that time?

A. Yes, I did; I tendered him that sum of money on that date.

Q. In what manner did you tender that payment?

A. I tendered that payment to him in the First National Bank, as a matter of a check which was received but——

Mr. Smallpage: I didn't hear that answer.

A. (continued) As a matter of a check.

Q. (By Mr. Wiley) Did he receive that check which you offered him?

A. No, he did not. He refused because he said there was not enough money there.

Q. How much money did he demand?

A. He started hollering about that storage.

* * * * *

Q. What did you do after that?

A. After that, Mr. Streeter hollered, "Well, I am keeping the \$2500.00 and I am handing it over to my attorney."

Q. What did you do then?

A. Well, the only thing that I could have done was went and got my attorney and see if I could come to some type of agreement.

Q. Who was the attorney?

A. Clarence Humble.

Q. When did you go to see him?

A. I went to see him right after the conference at the bank, which was right around noon Saturday.

Q. And when you saw him what then happened?

A. Well, Mr. Humble says, "It is no use for fellows like you getting into a fight. I would like to have you take me down and have a talk with Mr. Streeter."

Q. Well, did Mr. Humble talk to Mr. Streeter about this? A. Yes, he did.

Q. Did Mr. Humble offer to make him this balance payment of \$13,233?

A. Yes, Mr. Humble offered to make him the balance payment.

Q. Did or did not Mr. Streeter again refuse?

A. Mr. Streeter refused again.

Q. Did you then communicate this disagreement to Mr. Tozzi?

A. Yes, I did. (33, 34, 35)

Exhibit No. 4 is a telegram dated April 6, 1940, from Balley to Tozzi, as follows: "Answering my agreement purchase price \$1.45 no agreement to pay storage Streeter now demands storage. Have cash to pay today in full but only on agreement of \$1.45 clear to date of purchase. Wire reply." (37)

Q. Were any of the potatoes involved in this transaction ever delivered to you?

A. None whatsoever.

Q. After the disagreement to Mr. Streeter in regard to the matter of the payment of Mr. Tozzi's storage bill, did Mr. Tozzi ever offer to return to you the \$2500 you had paid?

A. He had never offered to return to me the original \$2500.

Q. Did he ever return it to you?

A. No, he has never returned it to me.

Q. Did Mr. Streeter ever offer to return you this \$2500?

A. No, he has never offered. (39, 40)

* * * * *

Mr. Dechant: Is there going to be any issue that Mr. William Streeter was not an agent of Tozzi & Company?

Mr. Smallpage: No, no dispute. We stipulated that. We admitted that in our pleadings. (40, 41)

Mr. Dechant: Well, I didn't think there would be but I just asked the question because the matter had come up.

Q. (By Mr. Wiley) Mr. Balley, you testified that you were engaged in buying and selling potatoes at the time of this transaction with Mr. Tozzi. Had you communicated with any of your dealers or have any prospects for the resale of these potatoes?

A. Yes, I did, I had prospects of resale of all of those potatoes.

Q. To whom did you communicate with regard to these potatoes?

A. I communicated with United Brokers of Portland, Dunbar McManus of San Francisco, and L. A. Potato Distributors of Los Angeles.

Q. Did you have any offer for the purchase of these potatoes?

A. Yes, sir.

Mr. Smallpage: To which we object on the grounds that it is incompetent, irrelevant, and immaterial, and not the fair measure of damage, the fact that this witness has rescinded the contract, and the only recovery would be the return of his \$2500. If he elects to go ahead with the contract, which is apparently what he desires to do, then his measure of recovery is the loss of market value.

Mr. Wiley: Your Honor, I believe it has been brought out that this contract was made in Oregon, and any evidence that tends to establish the loss sustained, definite evidence, I believe would be admissible to show the measure of damage. We have——

Mr. Dechant: I will overrule the objection. Go ahead.

Q. (By Mr. Wiley) You say you had communicated with United Brokers about the sale of these potatoes? A. Yes, I had.

Q. Did you make an offer for these potatoes?

A. They didn't make me a distinct offer, United Brokers and I worked a joint account daily at that time.

Q. Just explain how you would have handled the potatoes?

A. I would have shipped the potatoes to United Brokers, which I wanted to ship as many carloads as I wanted to ship, and if I didn't want to ship any I would not, at the original price of \$1.45, and then we would split the profits or losses, if there had been losses we would have split those, and if

there had been profits he would have received 50 per cent and I would have received 50 per cent.

Q. How would you have been paid for these potatoes if you had shipped to United Brokers?

A. I would have been paid the original price by a draft and the profit would generally be received by a check after the carload lot was sold.

Q. Did you communicate with any other parties about the sale of these potatoes?

A. Yes, I did; I communicated with the L. A. Potato Distributors.

Q. Any one else?

A. Dunbar McManus of San Francisco.

Q. Did Dunbar McManus Company indicate to you that they wanted to buy these potatoes?

A. They indicated that they would handle a few potatoes, yes: they would like to have some of those potatoes.

Q. Had you got to the point where you had quoted a price to them?

A. Yes, I had quoted a price; I had quoted a price to Dunbar McManus and also L. A. Potato Distributors.

Q. What price did you quote to those parties?

A. I quoted a price of \$2 F.O.B.

Q. Did either one of them accept this offer?

A. L. A. Potato Distributors accepted the quoted price.

Q. What price did you say?

A. \$2 F.O.B.

Q. F.O.B. where?

A. Klamath Falls.

Q. That is in the State of Oregon, isn't it?

A. Yes.

Mr. Wiley: To shorten this thing up, Mr. Commissioner; I have some correspondence had between these parties. I don't know whether we should tender each letter separately or not.

Mr. Dechant: Well, would it be possible for you to talk to Mr. Smallpage and find out whether he is agreeable and we can just introduce them as exhibits if they are material, if you think they are material and he has no objection to them?

Mr. Wiley: Well, they have a bearing in this respect, that they show he has been in the potato business and been dealing with different people, and it corroborates the joint account with United Brokers and prices from others.

Mr. Dechant: Oh, that is correspondence not with the respondent?

Mr. Wiley: It is correspondence with the brokers.

Mr. Dechant: Then you had better submit them to Mr. Smallpage and find out whether he has any objection.

(There was a consultation between counsel.)

Mr. Smallpage: I suggest we look them over during the—you adjourn at twelve?

Mr. Dechant: Yes.

Mr. Smallpage: It is nearly twelve now, and I will look them over during the recess.

Mr. Wiley: It just indicates Mr. Balley was in business and had certain customers.

Mr. Dechant: You can stipulate to that if Mr. Smallpage is willing.

Mr. Wiley: I might ask one or two questions.

Q. (By Mr. Wiley) Mr. Balley, you said you had correspondence with—I believe you named two or three dealers. Where are they located?

A. Well, there is a house located in Los Angeles one in San Francisco, and one in Portland, Oregon.

Q. Had you sold these parties potatoes previously.

A. Yes, I had.

Q. Will you state whether or not you were authorized to draw on them for the purchase of potatoes?

Mr. Smallpage: To which we object upon the ground that that is a legal conclusion.

Q. (By Mr. Wiley): Had they furnished you with draft books?

Mr. Dechant: I will overrule the objection. He may answer.

A. Yes, they have furnished me with draft books.

Q. (By Mr. Wiley): They had furnished you blank forms of drafts to draw on them?

A. Yes.

Q. In shipping potatoes to them?

A. Yes.

Mr. Dechant: Will you take the stand again?

Testimony of Richard Emil Balley, Esq., previously sworn, resumed the stand and testified further as follows:

Cross Examination

By Mr. Smallpage:

Q. Mr. Balley, I understood you to say on your direct testimony this morning that your first business relations with Mr. Streeter, and through him with Mr. Tozzi, for the purchase of these potatoes was on March 29, 1940? A. Yes.

Q. Are you sure of that? A. Yes.

Q. Didn't you make them an offer prior thereto for the purchase of these potatoes?

A. I did not make them any offer.

Q. Did you ever purchase any other potatoes from Streeter? A. Yes, I did.

Q. When?

A. Sometime during the month of February.

Q. And what did you pay for those potatoes?

A. To the best of my knowledge, I don't know. It was under an Army contract or Navy contract.

Q. Were you quoted a price plus storage or without storage?

A. Without storage.

Q. In other words, you did not pay storage?

A. I did not.

Q. Was that contract reduced to writing?

A. No, it was just a direct sale made and the cars were loaded at Bakersfield, California.

Q. And you got an account sales, did you?

A. Yes, I did.

Q. Now, other than that, is that the only transaction that you had with Streeter?

A. That is the only business transaction, yes.

Q. I present to you a letter dated April 17, 1940, addressed to Mr. Tozzi, purportedly signed by you. Did you sign that?

A. (After examining): Yes, I did.

Q. You caused it to be mailed to Mr. Tozzi?

A. Yes.

Mr. Smallpage: We ask that it be introduced in evidence and marked Respondent's Exhibit A.

Mr. Wiley: I would like to offer an objection to it on the ground, your Honor, that it relates to preliminary negotiations, first; second; there is nothing in writing whereby Mr. Balley under our Statute of Frauds in Oregon agreed to——

Mr. Dechant: Let me read the letter. I cannot tell until I look the letter over.

Mr. Smallpage: It is admissible on two grounds, first as rebuttal of his testimony that it is the first time he had negotiations—that letter is a statement to Mr. Tozzi that he had offered \$1.40 for these particular potatoes plus storage and that offer had been refused.

Mr. Dechant: (After examining): I will overrule the objection. The letter is admitted as Respondent's Exhibit A.

(Thereupon the document referred to was received in evidence and marked Respondent's Exhibit A.)

Q. (By Mr. Smallpage): Now, I call your attention, Mr. Balley, to this portion of this letter wherein you stated:

"I purchased potatoes from Streeter, and when

Cross Examination

By Mr. Smallpage:

Q. Mr. Balley, I understood you to say on your direct testimony this morning that your first business relations with Mr. Streeter, and through him with Mr. Tozzi, for the purchase of these potatoes was on March 29, 1940? A. Yes.

Q. Are you sure of that? A. Yes.

Q. Didn't you make them an offer prior thereto for the purchase of these potatoes?

A. I did not make them any offer.

Q. Did you ever purchase any other potatoes from Streeter? A. Yes, I did.

Q. When?

A. Sometime during the month of February.

Q. And what did you pay for those potatoes?

A. To the best of my knowledge, I don't know. It was under an Army contract or Navy contract.

Q. Were you quoted a price plus storage or without storage?

A. Without storage.

Q. In other words, you did not pay storage?

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Q. Was that contract reduced to writing?

A. No, it was just a direct sale made and the cars were loaded at Bakersfield, California.

Q. And you got an account sales, did you?

A. Yes, I did.

Q. Now, other than that, is that the only transaction that you had with Streeter?

A. That is the only business transaction, yes.

Q. I present to you a letter dated April 17, 1940, addressed to Mr. Tozzi, purportedly signed by you. Did you sign that?

A. (After examining): Yes, I did.

Q. You caused it to be mailed to Mr. Tozzi?

A. Yes.

Mr. Smallpage: We ask that it be introduced in evidence and marked Respondent's Exhibit A.

Mr. Wiley: I would like to offer an objection to it on the ground, your Honor, that it relates to preliminary negotiations, first; second; there is nothing in writing whereby Mr. Balley under our Statute of Frauds in Oregon agreed to——

Mr. Dechant: Let me read the letter. I cannot tell until I look the letter over.

Mr. Smallpage: It is admissible on two grounds, first as rebuttal of his testimony that it is the first time he had negotiations—that letter is a statement to Mr. Tozzi that he had offered \$1.40 for these particular potatoes plus storage and that offer had been refused.

Mr. Dechant: (After examining): I will overrule the objection. The letter is admitted as Respondent's Exhibit A.

(Thereupon the document referred to was received in evidence and marked Respondent's Exhibit A.)

Q. (By Mr. Smallpage): Now, I call your attention, Mr. Balley, to this portion of this letter wherein you stated:

"I purchased potatoes from Streeter, and when

I made the agreement the first time it was \$1.40 plus storage, and the second time I came back to purchase said potatoes I had to pay \$1.45 and storage was not mentioned. I went to pay Streeter hereon the 3rd of April," and so on.

Now, did you not in this letter refer to the potatoes the subject of this controversy?

A. It was the same potatoes, yes.

Q. So that, as a matter of fact, then, prior to this contract with Mr. Streeter on March 29, 1940, you had contacted him before and offered him a price of \$1.40 plus storage?

A. I did not offer him a price, no.

Q. Then did you get a quotation from Streeter?

A. I got a quotation from Streeter.

Q. And he told you definitely at that time he wanted \$1.40 plus storage for these particular potatoes, is that right?

A. The storage was mentioned, yes.

Q. And the price was mentioned?

A. That price was mentioned, yes.

Q. And what was the date of that conversation?

A. To the best of my knowledge, it might have been right around the 22d or 23d of March.

Q. In other words, then, about a week prior to this second conversation which led to the contract in question? A. Yes.

Q. Now, during that period of time did the potato market increase in price or decline?

A. Well, to the best of my knowledge, the potato market did not increase or did not decline.

Q. It was stationary, then?

A. It was about stationary, yes.

Q. Now, when he told you that he wanted a price of \$1.40 plus storage, did you know at that time how much the storage was?

A. No, I never; I just passed the deal, that is all.

Q. What is that?

A. I never knew anything about the storage. I just passed up the deal, that is all.

Q. You know what the word "storage" means?

A. Yes.

Q. You know what the rate is in Klamath Falls?

A. I didn't know what the rate was at that time.

Q. You had no idea?

A. None whatsoever.

Q. You had bought potatoes for these various brokers you told us about? A. Yes.

Q. Didn't you come in contact with storage rates?

A. No, I never did come in contact with storage rates.

Q. In other words, I am to infer from your testimony now that throughout your entire experience in the potato buying market in Klamath Falls, which was apparently quite extensive, you never came in contact with the rate of storage?

A. I never have.

Q. So, at the time Mr. Streeter quoted you this price of \$1.40 plus storage, you didn't know whether that was 5 cents, 10 cents, or 20 cents a bag?

A. I didn't know what it was.

Q. You had no idea.

A. None whatsoever.

Q. Now, I assume you were in the market to buy potatoes at that time, weren't you?

A. I was buying potatoes at that time, yes.

Q. And that was the object of your visit to Streeter on March 22d?

A. No, I did not visit Mr. Streeter on that day. I was out looking for two more boys that had some potatoes up there and had them on contract.

Q. You did contact Streeter on that day?

A. I stopped and asked him if he had seen the other two brokers up there, yes. He was at the railroad tracks.

Q. Didn't you ask him if he had some potatoes to sell?

A. Never asked him a thing about his potatoes.

Q. He just came out of the clear sky and told you he had some potatoes to sell at \$1.40 plus storage?

A. That is perfectly true, yes.

Q. And that storage meant nothing to you?

A. Meant nothing to me, no.

Q. What were you paying for potatoes up there to other sellers at that time?

A. I was buying, loaded f.o.b. cars between Malin and Klamath Falls, at \$1.40 per hundred.

Q. You stated that the second time you came back to purchase the said potatoes Streeter told you that you had to pay \$1.45, and the storage was not mentioned?

A. Yes.

Q. Not a word said about storage?

A. Not a word.

Q. Did you ask him anything about storage?

A. Never asked him anything.

Q. There were 10,000 bags, approximately, of potatoes, in the deal, is that right?

A. Yes, somewheres right around those figures.

Q. So that storage at the rate of \$1,000 would be approximately 10 cents a bag?

A. Right around 10 cents, yes.

Q. Now, as I understand it, just a rough—to sum up your testimony, this conversation which was held on April 3d was the first time that you knew that Streeter expected you to pay \$1.45 plus storage, which would make the total price \$1.55, is that right?

A. I believe it was.

Q. I call your attention to your letter, your exhibit, the Complainant's Exhibit there, the letter of April 4th, addressed by you to the Los Angeles Potato Distributors, in which you state:

“Today I called on Tozzi's man, Streeter, to sign the storage potato deal contract and he refused to do so, but he gave me the warehouse receipts, and accepted my check. So I think I have him where I want him. He never wrote or had me make on the receipt that I would pay storage, so do you think I would have to?”

Just what did you have in mind when you used that language, “So I think I have him where I want him”?

A. Well, on those potatoes there, that deal, as I say, I think it was the 3d of April when I contacted Mr. Streeter, the storage deal arose, and all

this time I was telephoning and corresponding with L. A. Potato Distributors of Los Angeles, and there was at that time potatoes on contract and I had this deal going through and it was a good deal; it looked good to me. I had them pretty well sold, and I would have made some good money; so I figured this deal was going through, that is all.

Q. Why did you use that language, saying you think you have got Tozzi where you want him? In other words, did you think that Streeter had sort of slipped up, as it were, in making out that warehouse receipt by not indicating there on it that storage should be included and therefore you were in a position to take advantage of the situation?

A. None whatsoever.

Q. Now, let me see. Going back to this letter of April 4th, you state, "I cannot get potatoes here any less than \$1.45 to \$1.55 naked,—" That means without the sacks, doesn't it?

A. That is right.

Q. Sacks are worth how much.

A. Sacks were worth about 10 cents at that time.

Q. So those potatoes sacked, then, would be \$1.55 to \$1.65?

A. That is right.

Q. And that is exactly the price that Streeter quoted you? Didn't he quote you a price of \$1.55 in sacks?

A. No, he quoted me a price of \$1.45.

Q. Taking it from his version of the contract, his quotation was \$1.55?

A. I don't know what his version was; mine was \$1.45.

Q. Why did you make the statement then to your distributor that you could not get potatoes less than \$1.45 to \$1.55 naked, which, putting it on a parity with the Streeter potatoes, would amount to \$1.55 to \$1.65?

A. Well, when you taper down at Klamath Falls to about four or five growers, they will hold what they want—they will take the best and hold them for the best price. Why should I worry if I cannot get potatoes at \$1.45 or \$1.55; I had an agreement at that time with Mr. Streeter.

Q. But you have told your Los Angeles Potato Distributors that, and you referred here to the Streeter potatoes?

A. Yes.

Q. You said that you could not get them at less than a price of \$1.55 or \$1.65?

A. All right.

Q. Then you made a misstatement of fact to the Los Angeles Distributors?

A. I might have done it; it can be possible too.

Q. All right. Did it seem strange to you—withdraw that. When this quotation of \$1.40 plus storage was made by Mr. Streeter to you on or about March 22d, did you think that price too high or too low?

A. No, I didn't know much about the price right there. I had just got around to see about the potatoes, and I couldn't tell you whether it was too high or too low.

Q. Did you buy any potatoes that day?

A. Yes, I believe I did.

Q. What did you pay for them?

A. I believe I paid \$1.25 naked.

Q. And what type of potatoes?

A. Sand-land potatoes.

Q. Is that the same type that Mr. Tozzi's potatoes were? A. Yes, sir.

Q. You paid \$1.25 naked, which in sacks would be equivalent to \$1.35?

A. That is right.

Q. And did you buy them delivered or out in the country?

A. I bought them delivered to the car, yes. They were out in the country but they would deliver them to the cars there. That is understood between grower and buyer.

Q. Now, then, when you were willing to pay \$1.45 in sacks a week later, it is fair to assume that the market was rapidly advancing?

A. Yes, the market looked good on old stock.

Q. Didn't it seem strange to you that Mr. Streeter quoted you a price of \$1.40 plus storage, which evidently was around 10 cents as of March 22d; and that he would reduce his price a week later? A. No, it was not strange to me a bit.

Q. Why not?

A. Because he quoted potatoes, the same potatoes, to Dalton & Evans at \$1.50, and they says, "Nothing doing," and that was not plus storage either.

Q. Are you sure of that?

A. I am very positive.

Q. What evidence do you base that statement upon?

A. What evidence?

Q. Yes.

A. On the evidence that Mr. Paul Dalton and Mr. Evans both told me in their own office that they had a teletype message that they wired to Hanson just what I stated, at \$1.50 f.o.b. car.

Q. Now, at the time you bought these potatoes, weren't you buying on joint account with Ross Phillippi?

A. Yes, I was buying on a joint account.

Q. In other words, he was jointly interested with you in the purchase of these potatoes?

A. No, he was not.

Q. What is the purport of this letter that you wrote to them on April 4th? On April 4th you state in a letter addressed to the United Brokers Company to a gentleman by the name of "Dear Ross," "Yes, we shall also agree to a joint account—" strike that out.

The letter reads as follows:

"If I see that I can make something of the Tozzi deal, referring to some cars, I will immediately confirm to you either by wire or by 'phone. Yes, we shall also agree to a joint account with you in which we share 50 per cent of loss and 50 per cent of profit . . .

"Potatoes here are selling for \$1.45 to \$1.65 naked."

This is on April 4th? A. Yes.

Q. Well, is it not a fact that Mr. Ross Phillippi was interested in this proceeding with you?

A. No, he is not. We work on a joint-account basis just exactly like if Mr. Tozzi worked on a consignment basis with somebody else. I put up the money and if I want to send them up there I do so and I take my chances on taking profits or losses. It was all my money in the deal. On a joint account basis generally the broker puts up the money from their own, the buyer buys them and ships them to him, and the deal is a joint deal.

Q. Now, coming back to this Ross Phillippi deal, you state in this letter of April 4th to him, as you stated to the Los Angeles Potato Distributors, "Potatoes here are selling for \$1.45 to \$1.55 naked." That would mean \$1.55 to \$1.65 in sacks, wouldn't it? A. Yes.

Q. And in your opinion was that the market price? A. Yes, as I said before, it was.

Q. Do you think that Mr. Streeter would sell you potatoes at \$1.45 when the minimum price, as you have stated in your letter, or the market price, was \$1.55 to \$1.65?

A. Yes, he would, because he didn't know what happened on March 29th when I bought the potatoes.

Q. In other words, Mr. Streeter was not conversant with the market price?

A. I guess not, not at that time. That was four days later.

Q. You say the market jumped four days later?

I note in your letter to Dunbar McManus of March 26th you state, "The market has jumped 5 to 10 cents higher." So, it started jumping along about March 26th, didn't it?

A. It started jumping right around March 20th, on through there.

Q. These potatoes in question were what is designated as "Klamath U. S. No. 1 russets," is that right?

A. Right.

Q. In your letter of April 2d to Dunbar McManus you state that this type of potatoes are selling from \$1.75 to \$2. Did you mean that?

A. Certainly.

Q. In other words, at the time you presented this contract to Mr. Streeter, wherein you state he agreed to sell you at \$1.45, in your opinion then the market was \$1.75 to \$2?

A. Yes.

Q. At the time that you purchased—let me see. On March 29th you purchased these potatoes from Streeter? When did you first contract any of them with a possible buyer?

A. Well, the first time I—the first time Mr. Streeter ever offered me the deal I had right around thirty or forty cars with Dalton & Evans at that time too. I had quite a few of them on contract and when I was submitted the price of \$1.40, and Dalton and Evans submitted the same price of \$1.40 f.o.b. car, I went to work on the deal right away.

Q. Well, did you ever sell any of these Tozzi potatoes?

A. Never sold a sack, no.

Q. On April 2d I note that you wrote Dunbar and McManus and said that you had purchased these thirty cars of storage potatoes and you wanted to know if they would buy some of them. Did they ever make you a firm offer?

A. He made me an offer, yes.

Q. What was the offer?

A. He made me an offer of about \$2.

Q. Where is that offer?

A. That offer should be somewhere in the correspondence. I don't know whether I have it here with me or not.

Q. \$2 where? A. F.O.B. Klamath.

Q. \$2 a sack f.o.b. Klamath?

A. Yes, and that delivery was not to be until right around May.

Q. And how many sacks?

A. He didn't quote how many sacks he wanted. He said, "I will handle some of those potatoes for you."

Q. Did he say that in writing?

A. It should be in writing, yes.

Q. Did he buy them outright, or was he going to sell them, handle them on a commission basis?

A. He was going to buy them outright, no consignment.

Q. What? No consignment?

A. No consignment.

Q. That seems strange to me when you were writing him and telling him you will sell them for \$1.65, on April 4th you state here you will sell him the Tozzi potatoes at \$1.65.

A. That is perfectly all right.

Q. And yet you tell me that in the face of the quotation by you to Dunbar McManus that you will sell them to him at \$1.65, he says he will pay you \$2?

A. Yes.

Q. Do you want us to believe that?

A. Did you ever figure out the actual storage charges between one month and the other?

Q. Do you know what they are?

A. Certainly I do today, yes.

Q. What are they? A. About 20 cents.

Q. About twenty cents a month?

A. Yes, 20 cents in two months; that is 10 cents a month.

Q. That is 10 cents a month?

A. If he keeps them potatoes in one day after May 1st I have to pay 10 cents on all the potatoes.

Q. You state the price here—you quoted him, where you said you can deliver the Tozzi potatoes to him at \$1.55 to \$1.65, and if you held them one month that would be only \$1.75?

A. \$1.75, all right.

Q. And yet you state that after you gave him that quotation he returned with an offer that he would pay you \$2? A. That is true.

Q. And you want us to believe that?

A. Yes. I do.

Q. All right. Well, I have a letter here in your exhibit dated April 20th, from Dunbar and McManus wherein they quote you—state that they will only pay \$1.40 for these potatoes.

A. That was after the deal was all over. The market went straight down. * * * *

Q. On April 6th? Now, in April when you and Mr. Streeter could not get together over the terms of this agreement for the purchase and sale of these potatoes, you immediately made a complaint, I take it, to the Agricultural Bureau?

A. Yes, there was a man suggested I take the deal up there.

Q. And to whom did you make that complaint?

A. To W. A. Hilgeson.

Q. And when was it you made that complaint?

A. I believe around the 14th day of April, but maybe later. That is the best of my knowledge.

Q. Had the market declined or the price at that time, or was it on the up grade?

A. The potato market?

Q. Yes.

A. I couldn't tell you anything about the potato market. I was not well up on it. I was working on this and I didn't keep up with the market at all.

Q. I thought you were in touch with the potato market during this period.

A. I was in touch with the market but not at this time. After this controversy between Mr. Streeter and I, I didn't pay much attention to it at all. Most of my contacts were with attorneys to see if we could not get this matter settled.

* * * * *

Q. Again, I believe you testified that you had had an offer of \$2 a hundredweight. I didn't get

whether it was from Dunbar McManus or some other dealer in California.

A. That is right.

Q. Was that correct, was it Dunbar McManus or somebody else?

A. I believe it was Dunbar McManus. I am not quite sure.

Mr. Wiley: This is a letter we would like to offer in evidence.

Mr. Dechant: Any objection?

Mr. Smallpage: Well, it is hearsay.

Mr. Dechant: We take that into consideration. I will admit it as Complainant's Exhibit No. 10.

(Thereupon the document referred to was received in evidence and marked Complainant's Exhibit No. 10.)

Cross Examination

By Mr. Smallpage:

Q. What was that f.o.b. Los Angeles or Klamath Falls? A. F.o.b. cars, Klamath Falls.

Q. It doesn't say so.

A. I don't know. I don't remember the letter exactly.

Q. That is before you negotiated for these potatoes? It was May 25th? A. Yes.

Q. And your testimony is that you first negotiated for the purchase of these potatoes March 29th, that is correct? A. That is correct.

Mr. Smallpage: That is all.

Exhibit No. 10 is a letter, dated March 25th, 1940, addressed to Mr. Emil Balley by the L. A. Potato Distributors, Inc., and is as follows:

Regarding the fancy sandland potatoes you bought and have stored in the ice house. I was thinking if you wanted to turn them we could buy 20 cars or all of them if you care to turn loose at this time at \$2.00 f.o.b. the price as per our telephone conversation.

I would like to leave them there for a while and take them as we need them. We could pay you half down and the balance when you load out the cars.

I feel that we are taking a chance in buying so many at this price, but believe like you do that the market is going up and we are apt to make some good money on these providing they are as fancy as you say they are.

We have bought several cars from you already and you certainly know quality, so we are trusting that these potatoes you have stored are as good as what you have been sending us.

Please let us hear from you immediately. You had better get me on the phone tonight and let me know if you care to sell us these potatoes.

(b) DEPOSITION OF CLARENCE A.
HUMBLE:

I have practiced as an attorney at law in Klamath Falls, Oregon, for eleven years, and am at present Deputy District Attorney, and President of the Klamath County Bar Association, and knew Emil Balley, who came to see me regarding a contract with Tozzi & Company for the purchase of certain

potatoes, said he had paid Mr. Streeter \$2500 down, and he had seen him the morning he came in to see me, and that a disagreement had arisen with regard to the payment of storage charges, and after he had shown me the check I was of the opinion he was not liable for the warehouse charges. We went to Malin and I showed Streeter the check with the agreement written on it, but he didn't agree with me. We then went to the bank, and I asked Emil if he was in a position to pay and he assured me he was.

"And Streeter refused to even consider the payment of \$13,000.00 unless we would agree to pay the warehouse charges, and we refused to pay or assume to pay the warehouse charges. Now my recollection is that at that point the thing just kind of blew up and everybody walked away." (pp 25 and 26.)

Q. Was the matter of making this payment discussed?

A. No, no; if I may elaborate on that. I insisted, before anything was transferred from Balley to Tozzi's account, that we be given assurance that Tozzi & Company was going to take care of those storage charges. My recollection is that nothing was ever said whether the money was to be paid in cash or frog skins.

Q. Did you make the offer to make payment, or did Mr. Balley make this offer to make payment?

A. My recollection—it is a recollection, you appreciate, is that we both offered payment.

(c) DEPOSITION OF MITCHELL
TILLOTSON:

I am manager of the First National Bank of Portland, Klamath Falls Branch, since June, 1936, and am acquainted with Emil Balley, who had been carrying an account in our bank two or three years.

A. "He told me he had purchased potatoes from Mr. Tozzi and that the potatoes were sold to the Los Angeles Potato Distributors, or Ross Phillippi. We agreed with Mr. Balley we would honor his draft on that order, against the Los Angeles Potato Distributors, for the shipment he made to them; we agreed we would honor his draft on Ross Phillippi or the United Brokers—whichever he was drawing on—to the extent of one car at a time, and that car should be paid for before further drafts were honored." (6)

Q. Let's come back to March, 1940; what type of document did you have from the Los Angeles Distributors guaranteeing the payment of drafts drawn on them by Mr. Balley?

A. We had an order (probably Exhibit No. 10) or, he had an order from them for the potatoes.

Q. You mean, an individual lot of potatoes; is that right?

A. An individual lot or whatever lot they ordered. (p. 5)

A. We would take care of some overdrafts on his account, under specific arrangements, and knowing what the money was to be used for and how it was to be used. (5)

Q. It has been alleged that this deal was to be consummated on April 6th in your bank, and that you had the money right there to give to Mr. Tozzi—that implies of course, that a line of credit had been arranged for, that these records had been made and that the deal, in so far as Mr. Balley and the bank were concerned, had been fully and thoroughly consummated, does it not?

A. I would assume so.

Q. But that is not a fact, is it?

A. Yes, it is a fact.

DEFENDANT'S WITNESSES

(1) JAMES TOZZI:

I live in Stockton, and I have been engaged in the fruit and produce business fully thirty years, and have extensive operation with branches in New York and various cities. Mr. Streeter worked for me in 1940. In March, 1940, I had around 30 cars of potatoes in storage at Klamath Falls. (128)

Q. Do you know whether or not Mr. Balley solicited the purchase of these potatoes in March of 1940?

A. Well, the information I had from Streeter was that Balley had taken an option on these potatoes some time around March 15th, in there, and if I remember correctly the option that he had was \$1.40 plus storage.

Q. Was that option exercised?

A. No. Then the option expired and the market started showing strength. In fact, It think

it could be verified by Government reports that the market advanced between 10 to 25 cents.

Q. A bag? A. A bag. (128)

Exhibit G is a statement of account with regard to the sale of the potatoes by James Tozzi and Company.

Q. (By Mr. Smallpage): Now referring to Exhibit G, Mr. Tozzi, what was the total amount received from the sale of those potatoes?

A. \$18,205.51.

Q. And is that the same amount that the investigator Mr. Dykes ascertained?

A. Yes, sir.

Q. Now, I note that you have added \$2500, being the payment that you received from Mr. Balley; so that would make a total amount of \$20,705.51?

A. That is correct.

Q. Now you have some deductions?

A. Well, we paid the cold storage company \$1660.70.

Q. Attached to this Exhibit G the second page of it—

A. (Interposing): Yes, the statement from the cold storage company.

Q. Now, your selling expense was how much?

A. Selling expense was 10 cents a sack, \$1085.10.

Q. And that left a net return of how much?

A. That left a net return of \$17,959.71.

Q. And less the cost of the potatoes?

A. Less the cost of the potatoes.

Q. That is what you had contracted with Mr. Balley? A. \$15,733.95.

Q. Which leaves a net of what?

A. \$2225.76. (135, 136)

The buyer pays the cold storage, not the seller.
(148)

In my office in Bakersfield, when Balley and Streeter were present, Streeter reported to Balley: Didn't you try to buy the potatoes for \$1.40 plus storage, and when I sold you the potatoes for \$1.45, the market had advanced fully a quarter. I gave you the terms of \$1.40 plus storage, and how could I sell you the potatoes at \$1.45 and assume the storage later when the market had advanced 15 cents or a quarter? (130)

SWORN STATEMENT OF

(2) WILLIAM M. STREETER

On March 29, 1940, Mr. Balley entered my office very hastily and asked me if I had sold my cold storage potatoes which I had shown him previously. I advised him that he might be a little late as I had given Dalton and Evans an option on them, and Mr. Balley advised me that he had to have this lot somehow. If he wanted the potatoes he must put up a check for \$2500, payable to James Tozzi & Co. Deal closed.

Dated: This 7th day of August, 1944.

Respectfully submitted,

SMALLPAGE & MACOMBER,

511 Savings & Loan Bank
Building, Stockton, Cali-
fornia,

Attorneys for Defendant and
Appellant.

WILSON S. WILEY,

608 Medical Dental Building,
Klamath Falls, Oregon,

Attorney for Plaintiff-
Respondent.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal] C. W. CALBREATH,

Clerk, District Court of the U. S. Northern Dis-
trict of California.

By F. M. LAMPERT,

Deputy Clerk.

[Endorsed]: Filed Aug. 11, 1944. C. W. Cal-
breath, Clerk.

[Endorsed]: Filed Aug. 15, 1944. Paul P.
O'Brien.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10848

EMIL BALLEY,

Plaintiff and Respondent,

vs.

JAMES TOZZI, doing business as JAMES TOZZI
& COMPANY,

Defendant and Appellant.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF PARTS
OF RECORD IN SUPPORT THEREOF

Now comes the Appellant above-named and states that the points upon which he intends to rely in the appeal in this action are as follows:

1. That the judgment rendered herein is against law in this; that the burden was upon Plaintiff to prove damages, if any he sustained, and no damages were proven for the reason that under the law, the only damages that Plaintiff could have sustained, were measured by the difference between the price at which Plaintiff agreed to pay Defendant for seed potatoes and the reasonable value of a like grade of potatoes at the time and place of sale, and there was no evidence whatsoever as to the reasonable value of a like grade of potatoes at the time and place of sale, to-wit: April 16, 1940 in Klamath Falls, Oregon.

2. That the evidence was insufficient to justify the judgment in this; that there was no evidence whatsoever introduced in this case to prove what, if any, damages were sustained by Plaintiff as a result of the breach of contract by Defendant.

3. That the findings of fact and conclusions of law herein are not supported by the evidence in this; that there is no evidence whatsoever to support Finding No. 8 of the Findings of Fact for the reason that no evidence whatsoever was introduced which would show what, if any, damages were sustained by the Plaintiff as a result of the breach of contract by Defendant.

4. That the parts of the record which Appellant considers necessary for the consideration of his points on appeal consist of all of that part of the record included in the "Stipulation as to Record on Appeal" dated August 7, 1944, and signed by Counsel for Appellant and also by Counsel for Respondent.

SMALLPAGE & MACOMBER,
Attorneys for Appellant.

[Endorsed]: Filed Aug. 26, 1944. Paul P. O'Brien, Clerk.